

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

BRIAN S. WINTER,

Petitioner,

V

PATRICK GLEBE,

Respondent.

CASE NO. C13-5608 BHS

ORDER ADOPTING REPORT
AND RECOMMENDATION AND
REMANDING FOR FURTHER
PROCEEDINGS

This matter comes before the Court on the Report and Recommendation (“R&R”)

of the Honorable Karen L. Strombom, United States Magistrate Judge (Dkt. 27), and

Petitioner Brian Winter’s (“Winter”) objections to the R&R (Dkt. 28).

On June 5, 2014, Judge Strombom issued the R&R recommending that the Court

deny Winter's petition for a writ of habeas corpus. Dkt. 27. On June 19, 2014, Winter

filed objections. Dkt. 28.

The district judge must determine de novo any part of the magistrate judge's

disposition that has been properly objected to. The district judge may accept, reject, or

modify the recommended disposition; receive further evidence; or return the matter to the

magistrate judge with instructions. Fed. R. Civ. P. 72(b)(3).

1 In this case, Winter first argues that his firearm enhancement was based on
2 speculation and conjecture. Dkt. 28 at 1–3. While it is true that there was no evidence
3 that the firearm allegedly used in the commission of the crime was repaired and was
4 actually capable of firing a projectile, the testifying officer asserted that he could have
5 repaired the firearm and made it capable of shooting a shell. The state court concluded
6 that such evidence was sufficient to establish that the firearm was “operable at some point
7 . . . , but not necessarily during the commission of the crime.” Dkt. 27 at 7–8. The Court
8 agrees with Judge Strombom that such a conclusion is not a decision that is contrary to,
9 or involves an unreasonable application of, clearly established federal law, as determined
10 by the Supreme Court of the United States, and is not a decision that is based on an
11 unreasonable determination of the facts in light of the evidence presented in the state
12 court proceeding. 28 U.S.C. § 2254(d). Therefore, the Court adopts the R&R on this
13 issue.

14 Winter also argues that there was insufficient evidence to support his conviction
15 for first degree robbery. Dkt. 28 at 4–5. The Court, however, agrees with and adopts
16 Judge Strombom’s conclusion that there was no error of law or fact in the state court
17 commissioner’s ruling on this issue. Dkt. 27 at 16–17.

18 Finally, Winter argues that both the Government and Judge Strombom failed to
19 address his double jeopardy claim. Dkt. 28 at 5. The Court agrees. Winter included the
20 argument in his petition (Dkt. 6 at 40–44), and neither the Government’s response nor the
21 R&R addressed the whether the ground for relief was properly exhausted or whether the
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1 ground states a valid claim. Therefore, the Court remands the matter for the sole purpose
2 of addressing Winter's argument.

3 The Court having considered the R&R, Winter's objections, and the remaining
4 record, does hereby find and order as follows:

- 5 (1) The R&R is **ADOPTED**;
- 6 (2) The Court **DECLINES** to issue a Certificate of Appealability for the issues
7 addressed in the R&R; and
- 8 (3) The matter is **REMANDED** for further proceedings.

9 Dated this 13th day of August, 2014.

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BENJAMIN H. SETTLE
13 United States District Judge
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